

BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

INTENDED CLAIM NO. BVIHCV 2003/0121

BETWEEN:

ZHU JIANG FINANCE LTD.

Applicant/Claimant

and

AMERICAN DREAM IN GUANGZHOU LTD.
TONY HONG PONG CHU
PAK TAO FUNG

Respondents/Defendants

Appearances:

Mr. Jack Husbands for the Applicant

Mr. Paul Dennis for the Respondent

2003: November 25th

2004: February 13th

JUDGMENT

[1] **d’Auvergne, J.:** On the 1st of October 2003 the Applicant filed this application seeking the following orders:

1. That it be declared that the Court should not exercise its jurisdiction to try the claim and that the proceedings be stayed.
2. That the order made on the 14th August 2003 be discharged.
3. That the service of the Claim Form be set aside and
4. That the statement of claim be struck out.

[2] The grounds stated for the application were as follows:

1. The Court is not a convenient or appropriate forum for the resolution of the dispute;

2. The order granted on the 14th August 2003 was defective in that it failed to comply with CPR 17.4(1)(4); and
3. The order granted on 14th August 2003 was obtained without notice but without full and frank disclosure by the Claimant of all material facts.

[3] The order granted on the 14th August 2003 hereinafter referred to as the 14th of August 2003 orders reads as follows:

1. That the Respondents are hereby restrained until further order, whether by themselves or by their servants or agents or in any way whatsoever, from representing or holding out any of the following persons to be shareholders of the Respondent Company, American Dream in Guangzhou Ltd., viz
 - (a) LING Jeffrey
 - (b) LAM Sau Kwok
 - (c) TONG Pui Chi Lucia
 - (d) CHAN Yuet Yi
2. That the Respondents are hereby restrained until further order, whether by themselves or by their servants and or agents or in any way whatsoever, from representing or holding out any of the following persons to be a director or officer of the said company, or as having any authority to represent the Company:
 - (a) LING Jeffrey
 - (b) LAM Sau Kwok
 - (c) TONG Pui Chi Lucia
 - (d) CHAN Yuet Yi
3. That each of the Second and Third Respondents are hereby restrained from acting as a director or officer of the said company or from, in any way whatsoever, representing or holding himself out as having any authority to represent the said company.
4. That without prejudice to the generality of the foregoing, each of the Second and Third Respondents are specifically restrained from exercising any authority in respect of the Company's Bank account #0136018131 held with the Industrial and Commercial Bank of China (Asia) Ltd.

IT IS FURTHER ORDERED:

5. That the Applicant shall commence the action in this matter on or before the 28th day of August 2003
6. This Order and copies of the Application herein and Affidavit in support thereof shall be served upon the Respondents on or before the 22nd day of August 2003.
7. The return date shall be on Thursday the 9th day of October 2003.
8. Liberty to the Respondents to apply to discharge this Order on giving 7 days notice to the Applicant.
9. Costs on this application are reserved pending further hearing.
10. This Order is to be filed and served by Solicitors for the Applicant.

[4] On the 9th October 2003 the matter was adjourned to the 22nd of October 2003. The matter was further adjourned and was eventually heard on the 25th November 2003.

[5] The application of the 1st of October 2003, noted in paragraph 1 of this judgment was supported by the affidavit of Tony Hong Cong Chu, the second Respondent of the 14th August 2003, orders.

BACKGROUND FACTS

[6] The Respondent is an International Business Company incorporated and registered in the British Virgin Islands (BVI) on the 28th January 2000. The issued shares of the Respondent are owned as to fifty percent (50%) by Ms Charlotte Chou (Ms Chou) and as to fifty percent (50%) by Mr. Lin Yong Ping (Mr. Lin). Both Ms Chou and Mr. Lin are directors of the Respondent.

[7] The Applicant is also an International Business Company registered in the BVI. It was incorporated on June 21, 1995, and on May 14 1996 merged with Honour Day International Enterprises Ltd. also a BVI International Business Company. The surviving entity of the merger was the Applicant. That the share capital of the Applicant is, and was at all material times \$50,000.00 divided into 50,000 shares of par value \$1.00 each.

- [8] It is the Respondent's contention that the Applicant was established for a Chinese joint venture project in Guangzhou, the People's Republic of China, having as its original sole shareholder American Dream Parks and Entertainment Ltd., which was also a BVI International Business Company. That the Chinese joint venture was aborted and in March 2000, the Respondent acquired the 10000 issued shares of the Applicant and therefore became the sole shareholder of the Applicant.
- [9] In or about June 2001 the Applicant commenced another project, hereinafter called the "University Project". It was estimated that the first phase of the University Project would require an investment of approximately RMB 80 million and that through its principals Mr. Lin and Ms. Chou agreed with Mr. Chu and Mr. Fung, the second and third Defendants in the suit, that in consideration of the said Defendants each contributing ten percent (10%) of the estimated cost of the Project the Respondent would transfer to each of them ten percent (10%) of its shares in the Applicant.
- [10] On the 8th of February 2002 pursuant to the said agreement the Respondent transferred 100 of the 1000 issued shares of the Applicant, which it then held, to Mr. Chu through his company Cumena Ltd. and the same amount, 100 shares to Mr. Fung through his company DDK (BVI) Ltd.
- [11] Thereafter following the transfer of the 8th of February 2002 the shares in the Applicant were held as to 80% by the Respondent 10% by Cumena Ltd. and 10% by DDK (BVI) Ltd.
- [12] Since Mr. Lin and Miss Chou together owned the Respondent it therefore follows that they effectively owned and controlled 80% of the Applicant's shares with Messers Chu and Fung effectively owning and controlling the remaining 20% through their respective companies noted above.
- [13] There are only four duly appointed directors of the Applicant. They are Mr. Chu who had been a director since May 1997 and continued as such, Miss Chou who was appointed in December 1998 and continued as such and Mr. Lin and Fung who were both appointed as directors on February 8th 2002.

- [14] By September 2002 the University opened its doors but the cost of its completion surpassed the estimated RHB 80 million and the excess of RHB 12 million was paid by the Respondent.
- [15] However, from the evidence it appears that from September 2002 to the filing of the action various happenings took place.
- [16] During the period September 2002 and April 2003, Messrs Chu and Fung procured the issue of an additional 49,000 shares in the Claimant and distributed them in the following manner – 9,000 to Mr. Chu, via Cumena Ltd., 8,000 to Fung via DDK (BVI) Ltd and the remaining 32,000 shares were distributed in the following manner to Jeffrey Ling 8,000 to Sau Kwok Lam, 8,000 to Pui Chi Lucia 8,000 to Yuet Yi Cham 8,000. The last four individuals were also made new directors of the Applicant.
- [17] Further, that on the 11th June 2003, Messers Chu and Fung with the assistance of security guards forced their way into the administration building of the University and purported to take control and asserted that Mr. Lin and Ms. Chou had been “sacked”. In addition, all books and records including stamps and other documents were removed.
- [18] It was as a result of the foregoing that the Respondent sought and was granted the 14th of August orders.
- [19] The Applicant in the present proceedings has disputed the facts which led to the granting of the 14th of August 2003 orders.
- [20] Mr. Chu confirms that he is a director of the Applicant but says that he was the one who appointed Miss Chou as a director and general manager of American Dream Parks a forerunner of the Applicant. He deposed that Miss Chou is and was always a very close friend of Mr. Lin who was later made a director .
- [21] He further confirms that Miss Chou told Fung and him that the working capital for the University project was RHB 80 million but they never produced any accounts. That on the 26th February 2002 Fung and himself contributed an additional RHB 3 million each.

[22] On the 28th February 2002, at Miss Chou's request they remitted a further sum of HK\$10,000.00 to her personal account from alleged shortfall in previous payment made on the 26th February 2002, caused by exchange rates; that it was understood by Fung and Chu that Chou and Lin would have contributed RHB 12 million each. He further deposed that after attending meetings on 28th September 2002, and the 1st of December 2002, both Fung and himself realized that their requests for the production of accounts were not forthcoming but instead Miss Chou wanted to reduce their respective shareholdings from 10% to 8.4%. They refused the later proposal.

[23] Chu's affidavit stated that on the 10th February 2003, he called a meeting of the board after notifying Miss Chou through her address appearing on the Register of Directors. At that meeting he appointed new directors to the Applicant and allotted unissued shares.

[24] He confirmed that on the 11th of June 2003, along with Fung and a number of policemen he went to the college; that a meeting was held in the absence of the policemen and a request was once more made for production of the books and records of the Applicant. Finally, Mr. Lin and his chief accountant Ms. Poon gave the accounting books, journals and ledgers to them which were conveyed to an audit firm for auditing. The undertaking was that upon completion of the audit, the books, journals and ledgers were to be collected by Miss Poon but unfortunately is to date still awaiting collection.

[25] **Grounds and conclusions:**

1. The Court is not a convenient or appropriate forum for the resolution of the dispute.

Both the Applicant and the Respondent are International Business Companies incorporated and registered in the BVI. This being so they can both be served without the parties having to invoke the discretion of the Court.

[26] This issue of domicile has always been a strong pointer when the ground of *forum non conveniens* is being considered. In Konamanini and others v Rolls Royce Industrial Power (India) Ltd. and others 2002 1 WLR 1269 this issue was greatly ventilated.

[27] The principles were also discussed at length in the judgments of this Court delivered by Hugh Rawlins, J. in Bitech Downstream Liited v Rinex Capital Inc and Woodbridge Trading Limited, Claims BVIHCV2002/0233 and BVIHCV2003/0008 on the 12th June 2003 and Astian Group Ltd. et al and TNK Industrial Holdings Ltd. et al Claim BVIHCV2003/0072 on the 17th of November 2003.

[28] I have also observed that the parties are all Chinese citizens who read and write in Chinese but the various affidavits were translated in English. This can be done again if needs be.

[29] The Order granted on 14th August was defective in that it failed to comply with CPR 17.4(1)(4) which reads:

“The Court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days (unless any of these Rules permits a longer period).”

[30] As I said in BVIHCV2003/0087 Fursey Management Ltd. v Gefio General Finance Corporation Inc, Coteva Investments Ltd. delivered on the 7th of October 2003.

“The rule is pellucid not more than 28 days.”

[31] It was argued by Learned Counsel for the Respondent that the Court should bear in mind CPR 2000 Part 1.2 – the application of the overriding objective:

Application of overriding objective by the Court which reads:

The Court must seek to give effect to the overriding objective when it

(a) exercises any discretion given to it by the Rules; or interprets any rule.

[32] In my judgment, this argument should be considered with reference to the case of Vinos v Marks & Spencer PLC 2001 3ALLER page784 at page 791 para 26 where Peter Gibson L.J. said:

"The construction of CPR, like the construction of any legislation, primary or delegated, requires the application of ordinary canons of construction, though the CPR unlike their predecessors, spell out in Pt 1 the overriding objective of the new procedural code. The court must seek to give effect to that objective when it exercised any power given to it by the rules or interprets any rule. But the use in r1.1(2) of the word 'seek' acknowledges that the court can only do what is possible. The language of the rule to be interpreted may be so clear and jussive that the court may not be able to give effect to what it may otherwise consider to be the just way of dealing with the case, though in that context it should not be forgotten that the principal mischiefs which the CPR were intended to counter were excessive costs and delays. Justice to the defendant and to the interests of other litigants may require that a claimant who ignores time limits prescribed by the rules forfeits the right to have its claim tried."

[33] As I see it, I should follow the decision in the BVI case of **Fursey No. 87/2003** noted earlier since that is not an issue to be case managed nor an issue for the consideration of **Rule 26.1(2)(k)** which empowers the Court to extend or shorten the time for compliance with any rule.

[34] **The order granted on 14th August 2003 was obtained without notice and without full and frank disclosure by the claimant of all material facts.**

[35] In my judgment this ground is a non-starter. **Rule 17.4(1)(4)** provides:

"The Court may grant an interim order under this rule on an application made without notice for a period of not more than 28 days....."

[36] Moreover, it is settled law that upon an application for the granting of an injunction the merits of the case are not considered though there must be full and frank disclosure of the material facts upon which the injunction will be granted. The affidavits considered gave different versions but confirmed the same facts.

[37] I therefore conclude that since the injunction was granted for a longer period than 28 days I should discharge the injunction. The injunction is discharged. The case is to follow its normal course. Costs in the sum of \$3,000 to the Applicant.

Suzie d’Auvergne
High Court Judge